In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-74

HAROLD F. CONELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-75

DONALD P. SMALLWOOD AND ROY E. LAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1971. The petitions for certiorari in each case were filed on July 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the rights of petitioners Smallwood and Lay were violated when the receiver of a corporation formerly controlled by petitioners surrendered records in his custody in response to a grand jury subpoena duces tecum (raised in No. 71-75).

2. Whether evidence presented by an accountant for the bankrupt corporation was properly admitted (raised in No. 71-75).

3. Whether the evidence sustained the conviction of petitioner Conell for aiding and abetting the mailing of an unregistered security (raised in No. 71-74).

STATUTES INVOLVED

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Section 5(a)(2) of the Securities Act of 1933 (15 U.S.C. 77e(a)(2)) provides:

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

* * * * *

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

STATEMENT

After a trial by jury in the United States District Court for the Eastern District of Missouri, petitioners Smallwood and Lay were convicted on seven counts of securities fraud, in violation of 18 U.S.C. 77q(a), seven counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of mailing an unregistered security, in violation of 15 U.S.C. 77e(a)(2). Petitioner Conell, similarly charged under the same indictment, was convicted only of aiding and abetting the mailing of an unregistered security, in violation of 15 U.S.C. 77e(a)(2). The trial judge, noting that thousands of persons, including many elderly individuals, had suffered from petitioners' scheme, commented during the sentencing proceeding that this was the "most vicious" securities fraud he had ever seen (Con. Pet. App. 17). Smallwood was sentenced to imprisonment totaling 35 years and an aggregate fine of $15,000; Lay to imprisonment totaling 20 years and an aggregate fine of $15,000; Conell to imprisonment for five years and a fine of $5,000

(App. 9-11, 12-33).[1] The court of appeals affirmed.

As set forth in the opinion below,[2] Smallwood, Lay, and Conell at all relevant times were the president, secretary and treasurer of Diversified Brokers, a Missouri corporation. This company sold its promissory notes to investors, promising rates of return up to 100% per annum. Petitioners falsely represented that each investment was assigned to a specific numbered project for buying and reselling government surplus and distressed merchandise when, in fact, only a small percentage was so invested. The balance was diverted to large personal expenditures of the petitioners, eventuating in the bankruptcy of the company (S. & L. Pet. App. 2-3).

ARGUMENT

1. On February 17, 1969, the Securities and Exchange Commission filed a complaint against Diversified and petitioners, charging violations of the Securities Act of 1933. Ten days later, petitioners consented to a final judgment enjoining Diversified from violating the Securities Act and appointing a receiver to take charge of its property and assets (S. & L. Pet. App. 4). Pursuant to this judgment, the re-

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[1] "App." refers to the appendix in the court of appeals on file with the Court; "S. & L. Pet." to the petition for certiorari of Smallwood and Lay; and "Con.Pet." to the Conell petition.

[2] Petitioners Smallwood and Lay (No. 71-75) adopt the statement of facts of the court of appeals, to which they make brief additions (S. & L. Pet. 3). Petitioner Conell does not specifically adopt this statement, but does not question its accuracy.

ceiver took charge of the office of Diversified, changing the locks and posting a guard (App. 38-42). On March 19, the receiver was served with a grand jury subpoena duces tecum for all the records of Diversified. He complied with the subpoena after he had requested and obtained additional records from Satz and Ponfil, attorneys for Diversified and petitioners. Petitioners were not present either at the time that Satz and Ponfil turned over records to the receiver or when the receiver turned over the records to the postal inspectors for delivery to the grand jury (App. 44, 118-122).

On July 1, 1969, petitioners Smallwood and Lay, through their present attorneys, filed a second supplemental motion to suppress Files 1 to 20, which were a part of the grand jury exhibits. The bulk of these files came from the records turned over by Satz and Ponfil at the request of the receiver. They showed transactions relating to real estate, motor cars, jewelry, boats, etc. (App. 62-69, 120-121). An accountant for the Securities and Exchange Commission testified that the items shown were all purchased from assets of Diversified, with the exception of the 1968 Cadillac Fleetwood shown in File 5 (App. 125-146). The court held that there was no proof that the records were personal. The motion to suppress was accordingly denied except with respect to File No. 5.

Contrary to the contention of these petitioners, their attorneys had no choice but to yield these records to the receiver. By the judgment appointing the receiver, to which they had consented, all property, assets and records of the company were *in custodia*

legis. Booth v. *Clark*, 17 How. 322, 331; *Taylor* v. *Sternberg*, 293 U.S. 470, 472. Had the attorneys chosen to resist the demand of the receiver they would have been in contempt. Cf. *Wiswall* v. *Sampson*, 14 How. 52, 64; *United States* v. *Maragas*, 390 F.2d 88 (C.A. 6). The factual finding below that these were corporate records was based on uncontradicted evidence. Thus petitioners had no right under the Fourth Amendment with respect to these papers, which were not theirs and which were not in their custody or possession. The right against self-incrimination under the Fifth Amendment has no applicability to corporate records. *Hale* v. *Henkel*, 201 U.S. 43, *Wilson* v. *United States*, 221 U.S. 361.[3]

2. Without citation to the record, petitioners Smallwood and Lay make a vague claim of error as to the admission of testimony by a certified public accountant concerning the exact amount of loss to the company which the accountant admitted was inaccurate because no physical inventory had been taken (S. & L. Pet. 6-7). The accountant referred to was Herbert A. Graham, retained by Smallwood in January 1969 to prepare income tax returns for Diversified (App. 359-360). Testifying for the government, Graham stated that he and his assistants determined the total loss of the company for the three-year period

[3] *Mancusi* v. *DeForte*, 392 U.S. 364, upon which petitioners Smallwood and Lay place principal reliance, does not touch upon the right of a court to custody of property in receivership. For this reason and for other reasons fully covered by the court below (S.&L Pet.App. 6-7), *Mancusi* is clearly distinguishable.

ending September 30, 1968, as $1,846,857.92. In reaching these figures, he accepted the oral information given to him by Smallwood as to the markup which would be made on the merchandise. He several times made unsuccessful requests to Smallwood for a physical inventory of the merchandise, but since this was not done, he could not say that his loss figures were correct (App. 370-372, 376-377). The criticism of this testimony and the exhibits introduced in connection therewith goes to its weight rather than to its admissibility. Especially since it was petitioner Smallwood who refused the requested physical inventory, the trial court properly exercised its discretion in admitting the summarizing exhibits, prepared under the supervision of this witness. *Boston Securities, Inc.* v. *United Bonding Insurance Co.*, 441 F.2d 1302 (C.A. 8); *Koolish* v. *United States*, 340 F.2d 513, 533 (C.A. 8), certiorari denied, 381 U.S. 951. In any event, lack of complete accuracy in ascertaining the amount of loss suffered by the company is of no significance here, in view of the enormous personal expenditures by these two petitioners, rendering the corporation hopelessly insolvent.[4]

3. The evidence fully sustained Conell's conviction on Count 21, which charged all three petitioners with placing and causing to be placed in the mails an unregistered security, a promissory note of Diversified to a Mr. and Mrs. Sharron Fowler in the amount of

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[4] The opinion of the court of appeals stated that these petitioners had spent $263,639.63 at one jewelry store and $884,239.89 for antiques, jewelry and other items at another store (S.&L. Pet.App. 3, n.2).

$9,200, payable in one year, with 100% interest (App. 32-33, 495). While Conell was not specifically shown actively to have participated in this particular transaction, the evidence showed him to be a principal actor in promoting the work of the company, of which this transaction was an integral part. He associated himself with Diversified at approximately the time it was incorporated and became its Treasurer and Executive Secretary, occupying a separate office at the company headquarters in St. Louis. His primary function was to raise funds for the company. He selected and supervised representatives in various states to solicit funds, dealing extensively with ministers and members of the Pentecostal Church, of which he was a member. At a church convention in 1966, Conell told one minister that he knew 85% to 90% of what the company was doing. He claimed to have raised through his individual efforts $150,000 to $200,000 for the company. Although his emoluments from the company were not on a level with those of the other two petitioners, he personally received from the company approximately $80,000 in bonuses, automobiles, overriding commissions, and an unsecured loan to purchase a $40,000 home (Con. Pet. App. 13-15). This evidence adequately showed that he was fully aware of the fraudulent aspects of the venture, and actively furthered them. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619; *Pereira* v. *United States*, 347 U.S. 1, 8-10. It is of no significance that Conell was acquitted on the other counts, since consistency in the verdict is not necessary. *Dunn* v. *United States*, 284 U.S. 390, 393.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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